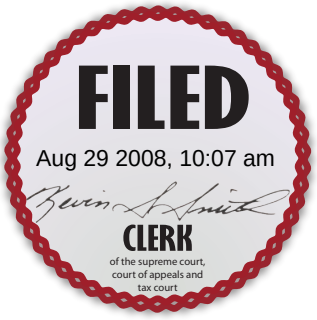

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM D. HAMMOND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0803-CR-153
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0609-MR-14

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant William D. Hammond ("Hammond") appeals his conviction of Voluntary Manslaughter, as a Class A felony,[1] and the sentence imposed following his Voluntary Manslaughter conviction and his guilty plea for Possession of a Handgun by a Felon, a Class C felony.[2] We affirm.

Issues

Hammond presents two issues for review:

I. Whether the State failed to negate his claim of self-defense; and

II. Whether he was properly sentenced.

Facts and Procedural History

On September 9, 2006, Josh Watkins ("Watkins") and Steve Ullery ("Ullery") encountered each other on Haney Street in South Bend. They began to argue over Ullery's treatment of Watkins' sister. The verbal confrontation escalated toward a fight. Joe Shields ("Shields") and Jeramy Briones ("Briones") accompanied Ullery while only a single person was with Watkins. Ullery advised Watkins to go down the street to the home of Paul Stackman ("Stackman") "to get someone to make sure no one jumps in." (Tr. 48.)

Watkins, who understood that a fistfight was about to occur, went to get Stackman. At that time, Stackman was having a party. Ten to fifteen of the partygoers moved toward Ullery's house. Stackman took his pitbull and a gun. When the group arrived at Ullery's house, Briones was on the sidewalk, holding a "flattened pipe … [that] looked like a

[1] Ind. Code § 35-42-1-3.

machete." (Tr. 93.)

A group of partygoers formed a semicircle around Briones. Hammond, Tom McFarland ("McFarland"), Watkins, Robert Hunter, and Tony Frost approached Briones until they were about six feet from him. Briones ordered the crowd to "back off or he was going to swing and hit someone." (Tr. 60.) Shields and Ullery, who had been on the porch behind Briones, left to get sticks or clubs. Briones and McFarland were "talking trash" and "threatening." (Tr. 92.)

Briones lunged forward, swung the pipe, and hit McFarland in the head. Almost simultaneously, Hammond fired a shot that entered Briones' chest. The crowd scattered and ran. Ullery and Shields attempted to aid Briones; however, he died in Ullery's living room.

On September 29, 2006, the State charged Hammond with Murder, Carrying a Handgun without a License, as a Class A misdemeanor,[3] and Possession of a Handgun by a Felon. On December 6, 2007, Hammond pleaded guilty to Possession of a Handgun by a Felon. The misdemeanor charge was dismissed. Hammond was then tried on the murder charge in a bench trial. On December 7, 2007, Hammond was found guilty of Voluntary Manslaughter.

On January 16, 2008, Hammond received consecutive sentences of thirty-eight years imprisonment for Voluntary Manslaughter and eight years imprisonment for Possession of a Handgun by a Felon. He now appeals.

Discussion and Decision

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[2] Ind. Code §§ 35-47-2-1, 35-47-2-23.
[3] Ind. Code § 35-47-2-1.

I. Self-Defense

Hammond testified and conceded that he shot Briones, but claimed that he acted only to defend himself and McFarland. According to Hammond, he was concerned that Briones would continue to strike McFarland with the pipe or would turn on Hammond and strike him.

A valid claim of self-defense is legal justification for an otherwise criminal act. Birdsong v. State, 685 N.E.2d 42, 45 (Ind. 1997). The defense is defined in Indiana Code Section 35-41-3-2(a):

> A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
>
> (1) is justified in using deadly force; and
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

When a defendant raises a claim of self-defense, he is required to show three facts: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or serious bodily harm. Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). Once a defendant claims self-defense, the State bears the burden of disproving at least one of these elements beyond a reasonable doubt for the defendant's claim to fail. Miller v. State, 720 N.E.2d 696, 700 (Ind. 1999). The State may meet this burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief. Id. Whether the State has met

its burden is a question of fact for the factfinder. Id. The trier of fact is not precluded from finding that a defendant used unreasonable force simply because the victim was the initial aggressor. Birdsong, 685 N.E.2d at 45.

The standard on appellate review of a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Wallace, 725 N.E.2d at 840. We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id.

The State did not dispute Hammond's claim that he was concerned for his or for McFarland's safety. Rather, the State, in reliance upon Driver v. State, 760 N.E.2d 611 (Ind. 2002), offered evidence to show that Hammond did not act without fault. In Driver, our Indiana Supreme Court reiterated:

> A claim of self-defense in a homicide prosecution requires that the defendant acted without fault, was in a place where he had a right to be, and was in reasonable fear of death or great bodily harm. Milam v. State, 719 N.E.2d 1208, 1210 (Ind. 1999). Thus, among other things, the defendant's claim requires that he did not provoke, instigate or participate willingly in the violence. Brooks v. State, 683 N.E.2d 574, 577 (Ind. 1997).

760 N.E.2d at 612. The defendant in Driver had arrived at the victim's home with three women who intended to physically fight the victim. See id. He was armed with a handgun and went "to prevent others from interfering with the anticipated fight." Id. After the victim's roommate announced that she was "going to kill me a [m-----f------]" and pointed her gun at Driver, he fired his gun, striking the victim in the head and killing her. Id. In concluding that the defendant's proffered self-defense instruction was properly refused, the

Court observed that the evidence showed "the defendant was part of the group that went to the victim's house intending to cause the victim bodily harm, that his actions were not without fault, and that he was there to willingly participate in violence." Id.

Similarly, there is evidence that Hammond joined with a crowd going to the scene of an anticipated fight. Hammond carried a handgun. He knew that Stackman had a handgun and a pitbull with him. Thus, Hammond placed himself in a situation ripe for violence. When Briones displayed a weapon and it appeared that a verbal confrontation was likely to evolve into a physical altercation, Hammond did not attempt to diffuse the situation. McFarland asked about Hammond having a gun and Hammond moved to display the weapon. He had sustained no physical injury to himself before he fired the weapon. After the shooting, Hammond fled without rendering aid to McFarland or Briones. He gave conflicting versions of the incident, initially denying that he was present and later claiming that he had acted in self-defense. He disposed of the handgun by breaking it into pieces and throwing away the parts. From this evidence, the fact-finder could have reasonably rejected Hammond's claim of self-defense.

II. Sentence

Hammond challenges his sentence on several grounds. He claims that the trial court failed to make an adequate sentencing statement, that consecutive sentences were not warranted, that the sentence for possession of a handgun cannot exceed the advisory sentence because it is part of a single episode, and that his sentence is inappropriate.

In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds,

875 N.E.2d at 218 (Ind. 2007), our Supreme Court determined that trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. So long as it is within the statutory range, a sentencing decision is subject to review on appeal for an abuse of discretion. Id. One way in which a trial court may abuse its discretion is to fail to enter a sentencing statement at all. Id. Another is to enter a sentencing statement that explains reasons for imposing a sentence and the record does not support the reasons, the statement omits reasons clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Here, the trial court commented as follows:

> As some of the factors I do consider, I consider the age of the defendant. He is young. I consider the fact that the defendant did have some juvenile matters. There were some adjudications I believe of that, but I do not consider those to be aggravators as such. I would consider them more to show that the defendant at a relatively very early age had fallen into having problems with use of marijuana, et cetera, which certainly probably interfered with his more advantageous education and training. I do not know that much about his personal family life, but I don't think he had great advantages in life that he threw away. I think he did not have the greatest childhood toward a productive adulthood. . . . I do consider that the victim here did – he did – I don't know if induced – I guess I would say induced the offense. You were free not to commit it. But I take that into account. As I said I would, I do take that into account as what they call in the statute a mitigator. But by no means should he have suffered what he suffered as a result of that. I would imagine – I

> conclude that the tragic circumstances of that evening are not likely to reoccur with you so I consider that, too. You have in your statements expressed great remorse, and I accept that you feel that. And I think that is a factor I do acknowledge and do consider.
>
> At the same time I have to consider other factors that are aggravators. The whole circumstances of the evening involved you voluntarily engaging in conduct that was not only a violation of your probation but which led you to voluntarily participate in an activity[.] . . . But on the other hand you also were on probation. You weren't supposed to be doing any of this stuff. Not that somebody not on probation should do any of it but it's just a greater aggravator. I find that the fact that you were already convicted of a felony and voluntarily were carrying a handgun is totally unacceptable. The fact that you were not just a felon but you were a felon on probation for a felony is more than being a felon. It's not part of the offense of being a felon in possession. It's being a felon on probation in possession of a handgun.
>
> For that reason my sentence on that count, which is Count III, is eight years. On the Voluntary Manslaughter with a Deadly Weapon, again I find the fact that you were on probation when you committed this offense is an aggravator of that offense of Voluntary Manslaughter. My sentence in that case – in that count is – the Probation Department recommended 45 years, I believe. My sentence on that count is 38 years. But I find the fact that you were on probation as a felon is a fact that justifies and all the other aggravators also justify making these sentences consecutive.

(Sent. Tr. 68-71.) We find the sentencing statement sufficient for this Court to conduct meaningful review. It is clear that the trial court relied upon Hammond's criminal history and violation of probation to support the imposition of a sentence greater than the advisory sentence.

Generally, the decision of whether to order consecutive sentences is within the trial court's discretion, and we will reverse that decision only when we conclude that the trial court abused that discretion.[4] Townsend v. State, 860 N.E.2d 1268, 1272-3 (Ind. Ct. App. 2007), trans. denied. In order to impose consecutive sentences, the trial court must find at

[4] Indiana Code Section 35-50-1-2 requires the imposition of consecutive sentences in some specified circumstances.

least one aggravating circumstance. See Morgan v. State, 675 N.E.2d 1067, 1073 (Ind. 1996). The same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms. See, e.g., Taylor v. State, 710 N.E.2d 921, 925 (Ind.1999). Here, the trial court found that Hammond's violation of probation supported consecutive sentences. Hammond has demonstrated no abuse of the trial court's sentencing discretion in this regard.

Hammond also contends that the trial court should have imposed an advisory sentence of four years for the possession conviction because it is part of a single episode of criminal conduct and is not a crime of violence.

Indiana Code Section 35-50-1-2, sometimes referred to as the episode statute, provides that an "episode of criminal conduct means offenses or a connected series of offenses that are closely related in time, place, and circumstance." Subsection (c) provides that, except for crimes of violence, the total of consecutive sentences for multiple felonies committed in the same episode may not exceed the advisory sentence for felonies one class higher than the most serious of the felonies for which the defendant has been convicted. Additionally, Indiana Code Section 35-50-2-1.3(c) requires that the trial court use the "appropriate advisory sentence" in imposing a consecutive sentence.

Hammond contends that his possession of the handgun was part of a single episode while the State argues that Hammond possessed the handgun after shooting Briones and disposed of it on a separate day. The State charged that Hammond unlawfully carried a handgun "on or about the 9th day of September, 2006." (App. 61.) Hammond pleaded guilty, offering a factual basis as follows:

Court: Did you violate the law by possessing a handgun?

Hammond: Yes, your Honor.

Court: On September 9, 2006?

Hammond, Yes, sir.

(Tr. 20.) The factual basis supporting Hammond's guilty plea and conviction for possession of a handgun does not establish his possession apart from the time during which he committed the offense of Voluntary Manslaughter. As his offenses are "closely related in time, place, and circumstance," and thus arise out of an episode of criminal conduct, we agree with Hammond that his possession sentence should be in compliance with Indiana Code Section 35-50-2-1.3.

However, we do not agree with Hammond that his possession sentence must be revised to four years, the advisory sentence for a Class C felony. Our Indiana Supreme Court concluded that subsection 1.3(c) does not "represent a general requirement that a consecutive sentence be for the advisory term."[5] Robertson v. State, 871 N.E.2d 280, 285 (Ind. 2007). The subsection imposed no additional restrictions on the ability of trial courts to impose enhanced or reduced consecutive sentences but "retain[ed] the fixed maximum sentences permissible under the episode and repeat offender provisions." Id.

Hammond was convicted of a Class A felony. The next highest sentencing classification applies to Murder, with the advisory sentence being fifty-five years. See Ind.

[5] The Indiana Supreme Court was considering the April 25, 2005 version of Indiana Code Section 35-50-2-1.3 (the version in effect at the time of Hammond's offense). The statute has since been amended, effective July 1, 2007. As a general rule, a court is required to sentence a defendant under the statute in effect on the date of the defendant's offense. Biddinger v. State, 868 N.E.2d 407, 414 n.6 (Ind. 2007).

Code § 35-50-2-3. Hammond's forty-six-year aggregate sentence does not exceed this term. His aggregate sentence is thus permissible under the episode statute.

Finally, Hammond argues that his sentence is inappropriate. Indiana Code Section 35-50-2-4 provides that a person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. Indiana Code Section 35-50-2-6 provides that a person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. Hammond requests that we reduce his thirty-eight and eight-year sentences to the advisory terms.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

With regard to the nature of the offense, the advisory sentence is the starting point in our consideration of an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). Hammond pleaded guilty to possession of a handgun. As to the voluntary manslaughter conviction, the trial court found that Hammond acted with some provocation from the victim and that the circumstances were unlikely to recur. These facts militate toward a lesser sentence.

On the other hand, Hammond's character is such that he has failed to lead a law-abiding life and he failed to benefit from prior rehabilitative efforts. He had several juvenile adjudications and a prior felony conviction for theft. He was on probation when he killed

Briones. He committed the offense after consuming alcohol and marijuana. In sum, Hammond has not persuaded us that his sentence is inappropriate.

Conclusion

There is sufficient evidence to negate Hammond's claim of self-defense. He has not demonstrated that he was improperly sentenced. His aggregate forty-six-year sentence is not inappropriate.

Affirmed.

RILEY, J., and BRADFORD, J., concur.